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1 UNITED STATES PATENT AND TRADEMARK OFFICE
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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
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8 *Ex parte* KATHERINE G. AUGUST and THEODORE SIZER, II
9

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11 Appeal 2009-000686
12 Application 09/818,616
13 Technology Center 3600
14

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16 Decided: November 18, 2009
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19 Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and BIBHU R.
20 MOHANTY, *Administrative Patent Judges*.
21 FETTING, *Administrative Patent Judge*.

22
DECISION ON APPEAL

1 STATEMENT OF THE CASE

2 Katherine G. August and Theodore Sizer II (Appellants) seek review
3 under 35 U.S.C. § 134 (2002) of a final rejection of claims 1, 6, 8-13, 41, 42,
4 46-54, and 60, the only claims pending in the application on appeal.

5 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b)
6 (2002).

7 SUMMARY OF DECISION¹

8 We AFFIRM.

9 THE INVENTION

10 The Appellants invented a wireless communication link which is
11 temporarily established between a customer and a vendor transaction
12 facility, which enables order processing before a customer even arrives at
13 the vendor transaction facility. The temporary wireless communication link
14 which is established between the customer and vendor transaction facility
15 permits the vendor to provide a menu of items or services for selection by
16 the customer, customer selection of desired items or services, and payment
17 transaction processing between the customer and vendor. Since most of the

¹ Our decision will make reference to the Appellants' Appeal Brief ("App. Br.," filed January 24, 2008) and Reply Brief ("Reply Br.," filed June 17, 2008), and the Examiner's Answer ("Ans.," mailed April 17, 2008).

operations associated with the purchase are completed before the customer actually reaches the vendor transaction facility, the only remaining operation is order fulfillment. (Spec. 2:6-16).

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below [bracketed matter and some paragraphing added].

1. A wireless apparatus for processing customer orders comprising:

[1] a communications transceiver

for broadcasting a wireless signal

to establish a wireless communications link with mobile customers

within a predetermined distance of a vendor facility,

said predetermined distance being such as to assure that a customer's order is fulfilled before the customer arrives at the facility;

[2] a control circuit

coupled to said transceiver for controlling said transceiver to:

[3] establish the communication link with the mobile customers,

[4] receive wireless orders from customers,

[5] arrange the customer orders in a queue

based on customer distances from a fulfillment station, and

[6] cause said received order to be processed to fulfillment; and

[7] a display device,

said control circuit further operable to control said display device to indicate the status and queue of orders

placed by customers communicating with said
transceiver.

THE REJECTIONS

The Examiner relies upon the following prior art:

Tracy	US 5,979,757	Nov. 9, 1999
Cupps	US 5,991,739	Nov. 23, 1999
Ding	US 2002/0059111 A1	May 16, 2002
Treyz	US 6,587,835 B1	Jul. 1, 2003

Claims 1, 6, 8-9, 11-13, 41, 42, 46-54, and 60 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, and Cupps.

Claim 10 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, Cupps, and Tracy.

ARGUMENTS

The Appellants argue these claims as a group. Accordingly, we select claim 1 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii) (2008).

The Appellants contend that none of the references describe an order that is sent within a predetermined distance of a vendor facility, said predetermined distance being such as to assure that an order is completed before a customer (or user of a device) arrives at the facility. (App. Br. 3-4).

ISSUES

The issue of whether the Appellants have sustained their burden of showing that the Examiner erred in rejecting claims 1, 6, 8-9, 11-13, 41, 42, 46-54, and 60 under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, and Cupps turns on whether any of the references describe, or show that it was predictable to have an order that is sent within a predetermined distance of a vendor facility, said predetermined distance being such as to assure that an order is completed before a customer (or user of a device) arrives at the facility.

The issue of whether the Appellants have sustained their burden of showing that the Examiner erred in rejecting claim 10 under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, Cupps, and Tracy turns on the resolution of the issue in the first rejection.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Treyz

01. Treyz is directed using handheld computing devices to obtain information, and to order products and services. A shopping assistance service provides users with access to directory information, and with product information and interactive advertisements. Electronic shopping techniques are supported in

which users make financial commitments toward purchases prior to completing purchase transactions. (Treyz 1:41-52).

02. Treyz will send messages to a potential customer when within a particular proximity to a vendor. (Treyz 38:39-45).

03. Treyz will send a message to a customer when an order is ready for pickup. (Treyz 38:56-60).

Ding

04. Ding is directed to filling orders placed by remote customers and may be placed directly from the customer to a desired vendor via a direct link after the customer location has been identified and the customer is presented with a list of vendors close to the customer location. At the time of the ordering, the customer can make payment arrangements. Once the order is received by the desired vendor, the order is assigned an identification tag so the customer may pick up the order at the desired vendor using an automated delivery system. Ding ¶ 0010.

05. When a vendor receives the order from the customer each order is assigned an identification tag. Orders received by the desired vendor are then prioritized according to the time or distance a customer is from the selected vendor as determined using the identified customer location. Ding ¶ 0026.

06. The customer location is identified using a global positioning system (GPS) which provides for determining the location of a customer without the customer having to input his or her location

and without the customer having to know exactly where he or she is presently located. Ding ¶ 0020.

Cupps

07. Cupps is directed to an online ordering machine that manages the distribution of home delivered products over a distributed computer system. The online ordering machine provides the customers with product information from various vendors whose delivery range is within the customer's location or with product information from vendors having take out service within a specified range from the customer's location. (Cupps 2:20-29).

Facts Related to Appellants' Disclosure

08. The Appellants state that the claim 1 limitation [1] of "within a predetermined distance of a vendor facility, said predetermined distance being such as to assure that a customer's order is fulfilled before the customer arrives at the facility" was found at (Spec. 38:5-10). (App. Br. 2). This portion recites "[a] local temporary communications link is established between a personal communications device carried by a customer and a vendor transaction facility and customer ordering is done over the communications link before the customer reaches the vendor facility, so that an order is placed and a transaction completed before the customer reaches the vendor facility. As a result, only order fulfillment is necessary when the customer reaches the vendor facility."

Facts Related To The Level Of Skill In The Art

09. Neither the Examiner nor the Appellants have addressed the level of ordinary skill in the pertinent arts of systems analysis and programming, wireless communications systems, and order fulfillment systems design. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985).

Facts Related To Secondary Considerations

10. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Obviousness

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

In *Graham*, the Court held that the obviousness analysis is bottomed on several basic factual inquiries: “[1] the scope and content of the prior art

are to be determined; [(2)] differences between the prior art and the claims at issue are to be ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” *Graham*, 383 U.S. at 17. *See also KSR*, 550 U.S. at 406. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 550 U.S. at 416.

ANALYSIS

The Examiner found that Treyz described the limitations of claim 1 except for arranging the customer orders in a queue based on customer distances from a fulfillment station and a display device to indicate the status and queue of orders with a transceiver. The Examiner found that Ding describes arranging the customer orders in a queue based on customer distances from a fulfillment station and prioritizing according to time or distance a customer is from the selected vendor, and that Cupps teaches the display device. The Examiner found one of ordinary skill would have applied Ding’s priority queue with Cupp’s display device to Treyz in order to provide a no-wait mechanism for placing and filling an order and display the order status. (Ans. 4-6).

The Appellants contend that none of these findings describe sending the order within a predetermined distance that assures order completion prior to arrival. (App. Br. 4). The Examiner responded that the GPS device used to identify the customer location would compute the distance to the vendor to select a close vendor and thus provide a predetermined distance and that the vendor’s return call of when the order was ready for pickup would assure order completion prior to arrival. (Ans. 10-14).

1 To this the Appellants contended that the Examiner assumed that the
2 distance was short and that the assurance was based on distance alone, and
3 that the claim did not require this. (Reply Br. 1).

4 As to the Reply Brief arguments, we do not find such assumptions
5 inherent in the Examiner's findings, nor do we find that the contentions
6 would, even if true, show error on the Examiner's part. These contentions
7 are not drawn to showing that the art failed to describe an order that is sent
8 within a predetermined distance of a vendor facility, said predetermined
9 distance being such as to assure that an order is completed before a customer
10 (or user of a device) arrives at the facility as in limitation [1].

11 So we are left with the issue of whether the art as found by the Examiner
12 describes this limitation. Initially, we make two findings as to the scope of
13 this limitation. First, given that unexpected delay in order fulfillment can
14 occur, no absolute assurance of order fulfillment prior to customer arrival is
15 possible, so the limitation must apply to an expected customer arrival time
16 rather than an actual arrival time. Second, the Appellants recited that the
17 support for this limitation in the original disclosure was in the abstract of the
18 Specification at 38:5-10. (FF 08). This portion recites only that an order is
19 placed and transaction completed prior to customer arrival so that only order
20 fulfillment is needed when the customer arrives. Thus the scope of the claim
21 as supported by the original disclosure is that of a fulfillment that occurs at
22 arrival rather than prior to arrival and whose timing is not specified as being
23 caused from there being a predetermined distance.

24 The claim does not recite any particular structure or algorithm for
25 predetermining the distance. Ding describes placing an order in a queue

1 prioritized by distance (FF 05) where that distance is determined by GPS
2 (FF 06). Thus the distance is determined in advance of placing an order and
3 is accordingly predetermined.

4 As to the assurance that the order is fulfilled before customer arrival, as
5 the Examiner found, Treyz will send messages to a potential customer when
6 within a particular proximity to a vendor (FF 02) and will send a message to
7 a customer when the order is ready for pickup (FF 04). The claims does not
8 specify any particular structure or algorithm for assuring the order is fulfilled
9 prior to customer pickup, only that a predetermined distance is such that it
10 occurs. Thus the claim does not even require a causal connection between
11 the distance and the time, but merely an implication that when the distance
12 implies fulfillment prior to arrival. Certainly Treyz's sending of a pickup
13 message when the customer is within the distance that such a message may
14 be received meets such an implication. Further, the fact that Treyz finds
15 potential customers within a predetermined distance suggests that such
16 potential customers would be among those that would subsequently receive
17 order pickup messages.

18 We further find that the requirement that the order be fulfilled prior to
19 customer arrival is a requirement for customer delay while the order is
20 fulfilled. Although such a delay would be created by having the customer
21 wait for a pickup message, it would also be created by a customer simply
22 being at a distance such that the time to arrive is sufficiently long for order
23 fulfillment. This would be met by any customer within the range of Treyz's
24 devices that were also far enough away to cause such a delay. Again, the
25 claim does not require causality, but only coincidence of a predetermined

distance and arrival time. Such a distance is predetermined by the order
fulfillment time and the speed of travel.

CONCLUSIONS OF LAW

The Appellants have not sustained their burden of showing that the
Examiner erred in rejecting claims 1, 6, 8-9, 11-13, 41, 42, 46-54, and 60
under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, and Cupps.

The Appellants have not sustained their burden of showing that the
Examiner erred in rejecting claim 10 under 35 U.S.C. § 103(a) as
unpatentable over Treyz, Ding, Cupps, and Tracy.

DECISION

To summarize, our decision is as follows.

- The rejection of claims 1, 6, 8-9, 11-13, 41, 42, 46-54, and 60 under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, and Cupps is sustained.
- The rejection of claim 10 under 35 U.S.C. § 103(a) as unpatentable over Treyz, Ding, Cupps, and Tracy is sustained.

No time period for taking any subsequent action in connection with this
appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Appeal 2009-000686
Application 09/818,616

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4 CAPITOL PATENT & TRADEMARK LAW FIRM, PLLC

5 P.O. BOX 1995

6 VIENNA, VA 22183